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September 8, 1997

REPLY TO:

The Honorable Charles W. Ballentine
Executive Director
Public Service Commission of SC
111 Doctor's Circle
Columbia, South Carolina 29203



Columbia

RE: Blue Ridge Electric Cooperative, Inc., vs. Duke Power Company, n/k/a Duke Power, a division of Duke Energy Corporation

Dear Mr. Ballentine:

Enclosed for filing, please find the original plus ten (10) copies of Blue Ridge Electric Cooperative's Brief of Petitioner. By copy of this letter, I am serving counsel for the Respondent.

Should you have any questions or need additional information, please feel free to contact me.

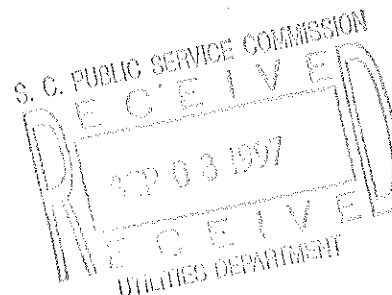
Sincerely,

Steven W. Hamm

SWH:lhb

Enclosure(s)

cc: The Honorable Gary E. Walsh (w/enclosure)
F. David Butler, Esquire (w/enclosure)
Richard L. Whitt, Esquire (w/enclosure)



POSTED
1997

BEFORE THE SOUTH CAROLINA
PUBLIC SERVICE COMMISSION

DOCKET NO. 97-153-E

S.C. PUBLIC SERVICE COMMISSION
RECEIVED
SEP 8 1997

IN RE: Blue Ridge Electric)
Cooperative, Inc.,)
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Petitioner,)
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vs.)
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Duke Power Company,)
n/k/a Duke Power, a division)
of Duke Energy Corporation,)
)
Respondent.)
_____)

BRIEF OF PETITIONER

S. C. PUBLIC SERVICE COMMISSION
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UTILITIES DEPARTMENT

ARGUMENTS PRESENTED BY PETITIONER

Page #

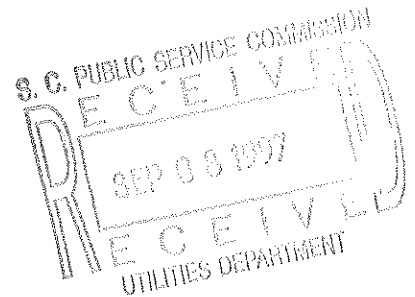
1. The evidence does not support Duke's contention that Order 16,394 designated unassigned territory in the area 300 feet from lines shown on Exhibit A 2
2. The 44kv line at issue is not a distribution line and therefore provides no corridor rights to Duke 5
3. There are no corridor rights attached to the 100kv line under S.C. Code Ann. §58-47-610(3), as the line is not a 44kv line nor is the premise to be served wholly within 300 feet of the 100kv line 8

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**BRIEF OF
PETITIONER**



This matter is before the South Carolina Public Service Commission (hereinafter "Commission") upon Petition of Petitioner Blue Ridge Electric Cooperative, Inc., (hereinafter "Blue Ridge") for an Order of the Commission requiring Respondent Duke Power Company (hereinafter "Duke") to cease and desist from attempting to provide power to the Nason Corporation, which is located wholly within territory assigned to Blue Ridge. Duke alleges that it is entitled to serve Nason by claiming corridor rights from a purported 44kv "distribution" line, and from a 1972 Order of the Commission that it alleges in its Motion for Summary Judgment created a 600 foot wide swath of unassigned territory within territory assigned to Blue Ridge, and that Nason is partially located within the swath. Duke also apparently argued at the hearing that pursuant to S.C. Code Ann. §58-27-610(3), it can claim corridor rights off of a 44kv line which no longer exists as it was converted to a 100kv line in 1974.

Petitioner denies that any creation of undesignated unassigned territory was determined or contemplated by the parties in the 1972 Order, and contends rather that the Nason plant is located wholly within its assigned territory as established within the 1972 Order. Blue Ridge also denies that the currently existing 44kv transmission line is a "distribution" line, and contends further that regardless of its function, pursuant to S.C. Code Ann. §58-27-620(1)(c), Duke cannot claim corridor rights as the "Bear Swamp" 44kv line was constructed after the 1972 territorial assignment designation. Blue Ridge further contends that no corridor rights were created by a line that is currently a 100kv line, both because 100kv transmission lines do not carry corridor rights and because the Nason premise that is the subject of this action is not located wholly within 300 feet from this line. As such, Blue Ridge is the sole and proper electric supplier for this new industrial premise initially requiring electric service after July 1, 1969.

1. The evidence does not support Duke's contention that Order 16,394 designated unassigned territory in the area 300' from lines shown on Exhibit A.

Blue Ridge strenuously contests Duke's assertions that the Public Service Commission has previously determined all issues before it in this matter in its Commission Order 16,394. Duke contends that the Commission designated the area within 300' from the electric lines shown on "Exhibit A" as unassigned, and that Blue Ridge agreed to this purported designation. There was no evidence presented at the hearing that this ever was the intent or agreement of the parties, and in fact, the evidence showed otherwise.

As the Commission is aware, Order 16,394 was a form order used by the Commission statewide, and upon information and belief of Blue Ridge, no party in any proceeding has championed Duke's self-serving interpretation during the 25 years since these orders have been issued. If Duke's interpretation were adopted, the Commission can certainly expect a floodgate of requests for hearings from all over the state on supposedly "unassigned" territory. There is no specific language or discussion in the 1972 Order that references any unassigned territory relating to any specific lines.

Further, the language in the Order simply tracks the language in the territorial assignment enabling statute, S.C. Code Ann. §58-27-640. Duke's interpretation is in direct conflict with the corridor rights provisions established within the Territorial Assignment Act itself. The ability to assert corridor rights within 300 feet of distribution lines is exhaustively and completely addressed within the Act. It is unreasonable to conclude that the parties to this proceeding or the Commission itself in its 1972 Order ever intended or attempted to displace the provisions of the 1969 Act.

Indeed, the Territorial Assignment Act contains language maintaining a presumption against concluding a line is a distribution line and requires that the Commission determine that the "primary purpose and use" of a line is for the distribution of electric power. The facts in this case cannot support such a conclusion. The record in this case shows that the "distribution" line in question has served only a single individual customer in all of the years of its existence.

In addition, the single customer is a plant that Duke serves because its load is above 750kw, and not because of any claim of corridor rights. There is no legend on "Exhibit A" of the 1972 Commission Order designating the 44kv line existing in 1972 as a transmission or distribution line. As stated above, the presumption within the Act is that a line is not a distribution line, and therefore carries no corridor rights. The evidence does not show that the original line ever served as a distribution line or that the second 44kv line constructed in 1974 was constructed to serve any specific customer, and indeed did not serve any specific customer until 1981. Duke was unable to name any specific customers served off of the original 44kv line constructed in 1969. It is difficult to contemplate how Blue Ridge could have agreed to treat this line as a distribution line with appurtenant corridor rights, when there were no distribution customers on the line at the time of the 1972 Order.

Further, the matter at hand cannot be res judicata as the current "Bear Swamp" 44kv line is not the same line shown on Exhibit A. Duke admitted that the 44kv line in question is not the same line shown on Exhibit A, as the "Darby" line shown in Exhibit A was completed in April 1969, and the current 44kv line was constructed in 1974. Pursuant to S.C. Code Ann. §58-27-620(1)(c), Duke cannot lawfully claim corridor rights from any line constructed after 1972. Since the 44kv transmission line in question was constructed in 1974, Duke cannot prevail on this argument.

Moreover, the line shown on "Exhibit A" is not surrounded by a white, non-marked strip on either side that would indicate that this area was designated unassigned. In fact, this line is surrounded by the coloring and markings used to represent exclusive Blue Ridge-assigned territory.

It is important to note that other lines are shown on "Exhibit A" in territory that is designated as unassigned and represented as white, unmarked areas. If area around these lines were truly intended to be unassigned, there would have been no need or reason for any party or the Commission to show any lines in this unassigned territory, as that would be a redundant designation of an unassigned area.

Based on the above noted facts and evidence presented at the hearing, Duke's contention that the area in question was determined by the 1972 Order to be unassigned territory should be rejected.

2. The 44kv line at issue is not a distribution line and therefore provides no corridor rights to Duke.

Duke is unlawfully attempting to serve Nason, alleging it has the ability to do so because Nason is located partially within three hundred feet of a Duke 44kv transmission line that Duke now, after over twenty-five years, claims is a "distribution" line.⁵ The testimony at the hearing established that the presently existing 44kv line that is the subject of this matter was constructed in 1974, and serves as a transmission tie line between Westminster and Walhalla. Duke could not name any customers that were originally served off of this line, and confirmed that the only customer now served off of this line, Steel Heddle, was

served pursuant to its initial load of 750kw. It is noteworthy that none of the Duke witnesses in their pre-filed testimony ever referred to this 44kv line as a "distribution" line.

Blue Ridge contends that the Commission must look to the primary purpose of the line at the time it was constructed and reject Duke's efforts to suddenly recharacterize this transmission line as a distribution line. While Duke now desperately wishes to call the Bear Swamp transmission tie line a "distribution line", Duke's witness at the hearing, Mark Johnson, admitted he was unaware of any line built as a "distribution line" where no customers were served off of the line for twelve years. Further, Duke witness Steve Goza testified it was uneconomical for Duke to serve the Nason plant off of this purported "distribution" line. Mr. Goza also testified that he was unaware of any other load Duke had attempted to serve based upon its claim of 600 feet of unassigned territory. This testimony clearly shows that the 44kv transmission line was not constructed in 1974 as a distribution line, nor has it been treated as such by Duke in the intervening years.

The Commission's mandate to look only at the original character of a line is also established in its regulation 103-304, wherein it refers to lines as they existed on the dates of assignment. S.C. Code Ann. §58-27-610(3) also provides that the Commission should examine the "primary purpose and use" of a line. Duke cannot now reasonably argue it built the 44kv line 25 years ago in order to provide electric service to the Nason Plant in 1997.

Further, S.C. Code Ann. §58-27-620(1) (c) provides that no electric supplier may assert corridor rights from distribution lines constructed after the time of assignment of territory. According to the birthmarks on the poles, the current "Bear Swamp" 44kv line was constructed in 1973, during which time the former 44kv "Darby" transmission line was converted to a 100kv transmission line. A 100kv line by definition cannot be a distribution line, and therefore carries no corridor rights with it. Even assuming Duke had some right to claim corridor rights with the original 44kv transmission line, which Blue Ridge expressly rejects, this line is now clearly a 100kv transmission line. As the 1969 "Darby" 44kv line no longer exists, any corridor rights Duke may have had also no longer exist. Duke cannot assert corridor rights appurtenant to the current "Bear Swamp" 44kv transmission line as it was constructed after September 5, 1972, the date of the Order assigning the territory in question wholly to Blue Ridge.

The plant location in question is wholly assigned to Blue Ridge and involves a new industrial premise "...initially requiring electric service after July 1, 1969" as established by S.C. Code Ann. §58-27-610, et seq. Not only is Duke attempting to invade the service territory assigned to Blue Ridge, but it also proposes to serve this load not off of its existing 44kv transmission line constructed after the Territorial Assignment Order issued by the Commission, but rather off of a 12.5kv line it will have to construct and extend, duplicating Blue Ridge's existing distribution line located immediately adjacent to the Nason property. The Territorial Assignment Act was designed and intended to avoid

exactly this type of wasteful duplication. It is therefore respectfully contended that Duke's effort to re-characterize its transmission line as a distribution line and to assert corridor rights under a 44kv line that no longer exists or under a 44kv line that was constructed after the 1972 territorial assignment should be rejected by the Commission.

3. There are no corridor rights attached to the 100kv line under S.C. Code Ann. §58-27-610(3), as the line is not a 44kv line nor is the premise to be served wholly within 300 feet of the 100kv line.

Duke seems to be attempting to raise a new and novel theory in its opening argument that was not raised in its Response or its Motion for Summary Judgment that somehow seems to claim that corridor rights can attach to transmission lines operating at 44kv, under S.C. Code Ann. §58-27-610(3). While Blue Ridge vigorously disagrees with Duke's interpretation of this statute, it contends that even if Duke's interpretation were accepted, Duke could still not successfully assert corridor rights under this provision.

What Duke overlooks in this contention are the facts in evidence that the 1969 "Darby" 44kv line no longer exists, as Duke admitted it was converted to a 100kv transmission line after the 1972 Order was issued by the Commission, and that the Nason premise is not located wholly within three hundred feet of this line. There is nothing within the statute that provides for corridor rights to attach to a 100kv transmission line. Further, even if Duke's novel interpretation is accepted, corridor rights would only be extended with respect to premises located wholly within three hundred feet of such a line. The evidence at the

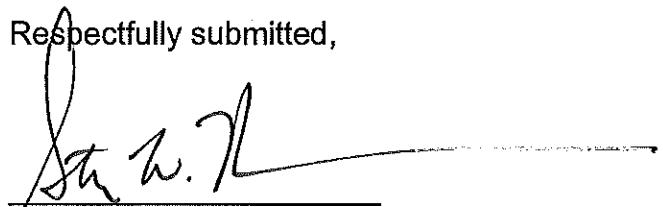
hearing presented by Duke showed that the Nason premise is not located wholly within three hundred feet of the 100kv line.

Duke argued briefly at the hearing that this would be a customer choice situation, apparently under S.C. Code Ann. §58-27-620. However, §58-27-610(3) does not reference §58-27-620, and rather, unambiguously refers only to premises located wholly within three hundred feet. As such, and based on the above, Duke's attempts to create corridor rights from a 100kv transmission line must fail.

Conclusion

For the reasons set out above, it is respectfully requested that the Petition of Blue Ridge be granted, and that the Commission issue its Order requiring Duke to cease and desist from its attempts to provide service to the Nason premises, and declaring Blue Ridge Electric Cooperative, Inc. to be the proper electric supplier for the Nason plant.

Respectfully submitted,

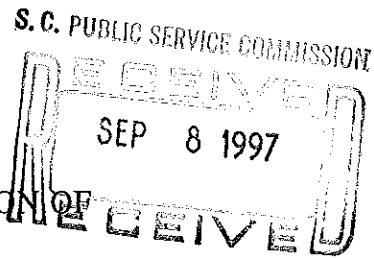
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Attorneys for Petitioner

Columbia, South Carolina
September 8, 1997

BEFORE
THE PUBLIC SERVICE COMMISSION OF
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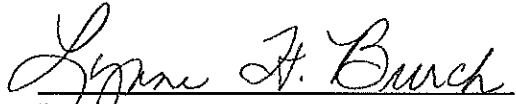


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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson, Plowden, Carpenter & Robinson, P.A., do hereby certify that I have served the foregoing Brief of Petitioner by causing a copy to be hand-delivered to the following individual:

Richard L. Whitt, Esquire
Austin, Lewis & Rogers
Post Office Box 11716
1310 Lady Street
Columbia, South Carolina 29211


Lynne H. Burch

September 8, 1997

Columbia, South Carolina